No. 78-640

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA EX REL. PETER O. ABELES,

Petitioner,

vs.

RICHARD J. ELROD, SHERIFF OF COOK COUNTY, ILLINOIS,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIORARI PETITION

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I.

THIS COURT'S SEVENTY-YEAR OLD DECISION IN MUNSEY V. CLOUGH SHOULD BE OVERRULED IN LIGHT OF EVOLVING DUE PROCESS STANDARDS.

Respondent's opposition brief does not squarely address the due process issue presented by this case. Respondent argues that under *Munsey* v. *Clough,* 196 U.S. 364 (1905), "petitioner had no right to a hearing before the Governor" of Illinois prior to his extradition to Wis-

consin. (R. Br. at 5.) The issue presented, however, is not what the decision in *Munsey* provides, but rather whether the decision in *Munsey* should be overruled.

Munsey is inconsistent with current concepts of due process which mandate notice and hearing prior to the termination of essential liberty and property interests. There is no doubt that extradition severely impinges upon these interests. In *Michigan* v. *Doran*, ... U.S. ....., 47 U.S.L.W. 4067 (December 18, 1978), Mr. Justice Blackmun, with whom Mr. Justice Brennan and Mr. Justice Marshall joined in concurring in the result, recently commented upon the significant loss of liberty which extradition entails (47 U.S.L.W. at 4071):

> The extradition process involves an "extended restraint of liberty following arrest" even more severe than that accompanying detention within a single State. Extradition involves, at a minimum, administrative processing in both the asylum State and the demanding State, and forced transportation in between. It surely is a "significant restraint on liberty."

Respondent's suggestion that due process does not apply to extradition proceedings because such proceedings have traditionally been labeled "summary" in nature begs the question. (R.Br. at 3.) This Court has required due process protection in proceedings which, historically, have been "summary" where liberty or property interests are at stake. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 610 (1975) (Powell, J., concurring); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978).

Regardless of the state of the law of due process at the turn of the century, extradition no longer may be considered immune from Fourteenth Amendment guarantees. *See, e.g., Michigan* v. *Doran, supra* (Blackmun, J., concurring).

This Court's recent decision in *Michigan* v. *Doran, supra*, underscores the need for notice and hearing prior to the governor's issuance of an extradition warrant. This Court recognized that "[a] governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements [for extradition] have been met." *Id.*, 47 U.S.L.W. at 4069. This Court held that "once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state." *Id.*, 47 U.S.L.W. at 4069.

Michigan v. *Doran* makes clear that the courts are precluded from any inquiry into the circumstances underlying an extradition request or the facts in a particular case in habeas corpus proceedings. Accordingly, the critical stage in the extradition process is the determination by the governor of the asylum state whether to issue the warrant. An individual whose extradition is sought must have prior notice and a hearing before the governor of the asylum state if he is to have any opportunity to plead the facts and equities of his case. No other forum is open to him.

Under present extradition practices, the governors are increasingly exercising broad discretion in the extradition process. *See, South Dakota* v. *Brown*, 20 Cal.3d 765, 144 Cal.Rptr. 758, 576 P.2d 473 (1978) (en banc); Comment, *Interstate Rendition: Executive Practices and the Effects*

of Discretion, 66 Yale L.J. 97, 106-109 (1956). Proper exercise of the governor's discretion requires that the person whose return is sought have prior notice of the charges and an opportunity to present his side of the case in order to prevent arbitrary decision-making by the governor as to whether extradition should proceed. *Goss* v. *Lopez,* 419 U.S. 565, 581 (1975); *Jay* v. *Boyd,* 351 U.S. 345, 363 (1956) (Black, J., dissenting).

II.

BECAUSE WISCONSIN SEEKS TO EXTRADITE PETITIONER PURSUANT TO A DEFECTIVE INDICTMENT, WHICH WAS LATER AMENDED, PETITIONER'S EXTRADITION CANNOT PROCEED CONSISTENT WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

The decision of the Court of Appeals would permit extradition based upon a defective indictment. This result is inconsistent with Article IV, Section 2 of the Constitution and 18 U.S.C. §3182, which require that extradition proceed only if the person whose return is sought is charged with a crime by the demanding state. *Pierce* v. *Creecy,* 210 U.S. 387 (1908); *Compton* v. *Alabama,* 214 U.S. 1 (1909).

The indictment on which Wisconsin seeks to extradite petitioner was acknowledged to be defective and was judicially amended. However, Wisconsin never made a new extradition request predicated on the amended indictment. Neither the Court below nor respondent has considered that the original Wisconsin indictment is an inadequate basis for petitioner's extradition.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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